IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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SUPREME COURT, U.S.

NO. 79-6027

ORIGINAL COPY

RAYMOND WOOD, EDNA ALLEN,
AND JAMES TANTE,

Petitioners,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

May a state imprison a person for the non-payment of a fine which is to be paid in installments during a period of probation when during that probationary period no payments are received after approximately three months while the individual is on probation?

STATEMENT OF THE CASE

Petitioners Edna Allen and James Tante were convicted under Georgia's obscenity statute concerning the showing of two movies which were adjudged to be obscene in violation of Ga. Code Ann. § 26-2101. Petitioner Allen was a ticket taker at the theater showing these films, while Petitioner Tante was the projectionist. The convictions of Allen and Tante were upheld by the Court of Appeals of Georgia. Allen, et al. v. State, 144 Ga. App. 233, 240 S.E.2d 754 (1977). Petitioner Wood was tried and convicted for distributing obscene materials under the same Georgia statute, only in this instance they were magazines which were being sold at an adult book store. Petitioner Wood's conviction was affirmed by the Court of Appeals of Georgia. Wood v. State, 144 Ga. App. 236, 240 S.E.2d 743 (1977). All of the Petitioners were tried and convicted following a jury trial. Certiorari to the Supreme Court of Georgia was denied in both appeals.

STATEMENT OF THE FACTS

The complained of sentences were imposed in October of 1978, with each Petitioner being placed on a period of probation along with the payment of a fine. Specifically, Petitioner Wood received a $10,000.00 fine and twelve months on probation on two counts which were running consecutively, with Petitioners Tante and Allen receiving a $5,000.00 fine and twelve months on probation. The fines were to be paid on an installment basis to the Probation Office in Fulton County, Georgia at the rate of $500.00 per month for ten months by each Petitioner.

Approximately two and one half months after being placed on probation petitions for revocation of probation were filed against each Petitioner for their failure to comply with this portion of the terms of probation, namely the installment payments of $500.00 per month as part of fines which were adjudged earlier. A revocation hearing was held on January 26, 1979. (See, Appendix A which is the transcript of the revocation proceedings.)[1/]

Petitioner Allen, the ticket taker,admitted at the revocation hearing that her probationary period began on October 23, 1978. (T. 6, 8). Ms. Allen further testified that she was collecting $64.00 a week from unemployment compensation having been dismissed by the employer at the movie theater where the obscene films had been shown, films which led to her arrest. (T. 10-11). Ms. Allen's testimony indicates that when she was hired she was told by her employer that they would pay any fine which might be adjudged against her, and that they would take care of her in connection with any litigation growing out of her employment. (T. 4, 13). In fact, in another proceeding which arose subsequent to this conviction Ms. Allen's employer, the same people that

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[1/] References to testimony from the January 26, 1979, revocation hearing will appear as T. followed by the respective page number on which the cited material appears.

employed her at the movie theater, paid her attorneys' fees and a fine following her entering a plea of guilty. (T. 12).[2/] While Ms. Allen indicated that she had been unsuccessful in trying to secure employment, her testimony and that of her probation officer make it quite apparent that she sought no modification of the probation order to reduce the amount of the fine, or to provide for smaller payments.[3/] At no time has Ms. Allen tendered even a partial payment in a minimal amount such as $5.00 or $10.00. Ms. Allen argues that she is not able to get a job, particularly because she has an eye problem, but this eye problem only occurred approximately a week before this hearing. (T. 8). Furthermore, there is no indication from Ms. Allen that at the time the court pronounced sentence there was any objection or comment to the court that she would be unable to pay the fine. Ms. Allen by her silence in October of 1978 engaged in a course of conduct which led the court to believe that she had the resources to pay the fine.

Petitioner Tante gave similar testimony, which indicates that he too was of the belief that his employer would pay the fine. He too in a subsequent case was also represented by the same attorney who is representing him in this appeal, and following the entering of a guilty plea his employer paid both his attorneys' fee and the fine. (T. 41, 43). The probation

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[2/] During the probation revocation hearing there were several discussions between the Court, the Petitioner's lawyer and the Solicitor concerning the fact that the Petitioner's lawyer also represents the Plaza Theater, the theater in which Petitioners Allen and Tante were employed. The argument of the Solicitor was that the employer had agreed to pay the fines, and now was attempting to get out of paying the fines by arguing that there was no agreement, and that the Petitioners were now indigents, so that under the Equal Protection Clause, they could not have their probation revoked because of their failure to pay fines because of a lack of financial resources or ability to pay the fines. See, T. 26-28.

[3/] The reason for going on unemployment appears to be somewhat indicative of a collusive agreement between Ms. Allen and her employer which would result in a reduced ability to pay any fine.

officer in regard to Petitioner Tante stated that he would have accepted minimal amounts such as $5.00 or $10.00, but that the Petitioner never sent anything in, nor did the Petitioner ever offer to pay any reduced amounts. (T. 32). There is no showing in regard to the testimony of Petitioner Tante that he is indigent, the only testimony being that his income is not sufficient to meet the monthly payments. Once again, Petitioner Tante never sought any modification of the fine, and in essence led the Court to believe that he could pay the fine.

The testimony of Petitioner Wood is almost identical to that given by Petitioners Allen and Tante. Wood testified that it was his understanding that at the time he was employed by the company where several obscene magazines were sold leading to his arrest and conviction, that his employer would pay any fines and court costs as a part of his employment. (T. 62). In fact, in two subsequent arrests following the arrest which led to this conviction, the employer of Petitioner Wood paid court costs, fines, and attorneys' fees. (T. 51, 57). Similar to Petitioners Allen and Tante, Wood never informed the Court at the time the probated sentence now complained of was given to him, that he could not pay the fine, nor has he ever sought a modification of the fine.

REASON FOR NOT GRANTING THE WRIT

THE REVOCATION OF A SENTENCE PROBATED ON CONDITION OF INSTALLMENT PAYMENTS OF A FINE WHEN THE PROBATIONER FAILS TO PAY DOES NOT VIOLATE EQUAL PROTECTION RIGHTS.

The Petitioners each contend that their imprisonment for failure to pay a fine on installments after being placed on probation violates the Equal Protection Clause of the Constitution since they are financially unable to meet each installment as it becomes due. In essence, the Petitioners seek to equate their conditionally probated sentences within the legislatively mandated judgments which frame the issues in Williams v. Illinois, 399 U.S. 235 (1970) and Tate v. Short, 401 U.S. 395 (1971). In Williams, supra, this Court stated that a period of confinement may not be extended beyond the maximum period provided by statute because of the failure of an individual to meet the conditions of that sentence which calls for monetary remuneration because of the individual's indigency. Id. In Tate v. Short, supra, this Court held that a statute may not immediately convert a fine into a period of imprisonment when the individual, because of indigency, cannot pay the adjudged fine.

This Court in Williams, supra, did not rule out the right of a state to enforce the non-payment of a fine as part of a sentence where the individual was unable to pay the fine.

> The state is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse

> discrimination since it would enable an indigent to avoid both the fine and imprisonment for non-payment whereas other defendants must always suffer one or the other conviction. Id. at 399.

This was further reiterated in Tate, supra, wherein this Court stated, "Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await presentation of a concrete case." Id. at pp. 400-401.

The most recent case to come before this Court to consider the issue which is raised in this matter is that of Hunter v. Dean, 439 U.S. 281 (1978), a case in which the writ of certiorari was dismissed as having been improvidently granted. In Hunter, supra, the facts showed that at a plea of guilty there was an inquiry by the court as to whether Hunter could pay a fine, and how the fine could be paid. There petitioner Hunter responded that her cousin would pay the fine. As a condition to probation a fine was adjudged. In neither Morris v. Schoonfield, 399 U.S. 580 (1970); Williams v. Illinois, supra; or Tate v. Short, supra, has the present type of situation been reviewed under the Equal Protection Clause, with the Court rather assessing the statutory schemes in light of the objectives of those statutes. Sub judice, the importance of the sentencing functions of a state court is the matter which is presented in this question for a petition for writ of certiorari. Under Georgia law a trial judge may place an individual on probation under the Statewide Probation Act, Ga. Laws 1956, pp. 27-26, as amended [Ga. Code Ann. §§ 27-2702 et.seq. (1978 Rev.)]. As a condition precedent to probation

the judge in his discretion may require the payment of a fine, costs or both. Id. During that time when the sentence is probated the sentencing court retains jurisdiction over the defendant and may revoke, rescind, or modify the sentence. Id. At no time during the probationary period which commenced on October 23, 1978, have any of the Petitioners sought a modification or a rescinding of that portion of the sentence which required the payment of a fine. None of the Petitioners offered to make any partial payments, nor did any of the Petitioners at the time the fines were imposed lead the court to believe that they could not pay the fines. To the contrary, by their silence the Court was led to believe that the Petitioners had the financial means by which to pay the fines. It is also apparent that the Petitioners believed that the fines would be paid for them.[4/] (T. 14, 41, 43, 62). In fact, each of these Petitioners had subsequent pleas of guilty in which fines were adjudged, with the fines being paid by their respective employers. It is also apparent that at the time each of the Petitioners received their probated sentence which called for the payment of a fine that there was an agreement that their fines would be paid for them.

> I candidly admit to the court there was an agreement between Ms. Allen and another person about paying the fine. And apparently it hasn't been enforced. (Remark by Attorney Zell to the Judge during the Revocation Hearing appearing at page 16 in said transcript which appears as Appendix A.)

If as this Court stated in Tate v. Short, supra, a state may enforce its judgments upon those who do not pay their fine, this would seemingly concede that the states have the right to imprison a person for the non-payment of a fine when they have been given

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4/ Belief that another would pay a fine also appeared in Hunter v. Dean, supra.

an opportunity to pay that fine in installments, particularly when they have led the court to believe that they could make those payments, and have not sought any modification or a rescinding of those payments.

The Petitioners should be precluded from being rewarded for their less than good faith assurances at the time the probated sentences were given to them by not indicating to the Court that the fines were beyond their financial means, and then coming in at a later time after having the advantage of being placed on probation to argue that their incomes are insufficient to pay those fines. There is something fundamentally repugnant about an individual being less than candid with a court, particularly when they lay back in hopes that they can meet the installments, and then seek to nullify their eariler approval of that sentence by their silence claiming that they are financially unable to meet those payments. Respondent believes that the Petitioners in this instance are not indigents, in that two of them are gainfully employed, and the third one chooses unemployment compensation which pays a far lesser amount than would be available if she had a permanent job.

At stake here is the reputation of the sentencing function of the criminal justice system. The public assesses the effectiveness, that is,the success or failure of the criminal justice system, in terms of the direct results which are achieved from the sentencing procedure in that system.

The payment of a fine on an installment basis is a legitimate sentencing tool which helps to assure that the probationer will have a greater responsibility in conforming his conduct to the law, since the fear of revocation and possible imprisonment has a more immediate impact on the probationers here than on a probationer who pays his fine up front, or at the beginning of the period of probation. If, however,

the probationer chooses to disregard his financial obligations then the trial court should have the option of revoking probation and placing the individual in jail, particularly when as in this case the Petitioners have not made any reasonable efforts to satisfy the fines imposed by the Court.

The integrity of the criminal justice system requires that those who choose to mislead a sentencing court into a belief that they can make a fine not be permitted to hide behind a claim of indigency, particularly when they have not made any efforts to make partial payments of a lesser amount, or seek a modification of that sentence. Sub judice, the claim of indigency on behalf of the Petitioners is transparent. There has been absolutely no showing by any of the Petitioners that they would be unable to pay these fines under any circumstances. Clearly, the Petitioners have not made any sincere efforts in trying to pay the fine, or in seeking to have the fines reduced. The cases of United States v. Boswell, 605 F.2d 171 (5th Cir. 1979); and United States v. Taylor, 321 F.2d 339 (4th Cir. 1963) are all distinguishable from the facts in this instance, since there has been no showing in this case that any efforts were made by the Petitioners to seek reduced payments. In fact, Respondent believes that the Petitioners have no intention whatsoever in paying these fines, as their testimony indicates that they are of the opinion that their employers should have paid these fines. The Petitioners are thus holding the enforcement of fines as a recognized sentencing tool a hostage because of their beliefs that others should pay their fines for them. By arguing at this time that they are indigent they are using this as a shield to hide behind their responsibility to pay a fine, which they earlier agreed to pay by virtue of their silence which led the sentencing court to conclude that they were able to pay these fines.

CONCLUSION

For these reasons it cannot be said that the Equal Protection Clause has been violated, particularly where the Petitioners do not come to this Court with clean hands concerning their failure to pay a fine as a part of a sentence which they received following their criminal convictions in Georgia.

Respectfully submitted,

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